No. 88-1341

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES, INC., AS COUNSEL FOR VERNICE DUBOSE, ET AL., PETITIONERS

v.

JACK KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the terms of the settlement agreement negotiated by petitioners preclude their claim for attorneys' fees for administration of the settlement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 857 F.2d 889. The opinion of the district court (Pet. App. 36-90) is reported at 579 F. Supp. 937.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988, and a petition for rehearing was denied on November 4, 1988 (Pet. App. 292). Pursuant to an order of Justice O'Connor, the time within which to file a petition for a writ of certiorari was extended to February

9, 1989, an the petition was filed on February 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The instnt claim for attorneys' fees under the Equal Access to Jstice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), is the most reent stage in this complex litigation, which is summarize in this Court's opinion in *Pierce* v. *Underwood,* No. 6-1512 (June 27, 1988), slip op. 1-2 (Pet. App. 199-202), ad in the court of appeals' opinions in the instant case.Pet. App. 1-17, 18-34. Briefly, this litigation and *Underwood* both resulted from challenges to the Secretary'sdecision not to implement an "operating subsidy progran" established by the Housing and Community Developmat Act of 1974, Pub. L. No. 93-383, 88 Stat. 633; the pogram was designed to defray certain increases in utility osts and local property taxes of low income housing pojects covered by Section 236 of the National Housing Act, 12 U.S.C. 1715z-1 (1982).[1] Pet. App. 25. The litigaon was settled, prior to enactment of EAJA, pursuant to a stipulation for settlement dated September 26, 1978 (*id.* at 133-165), that provided for the establishment of a settlement fund and administration of its distribution by a committee of plaintiffs' counsel (COC).[2] The agreementstated in Section 4(d) that HUD was to bear

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[1] Petitioners are counsel for the members of a class consisting of tenants of Section 236 housing in Connecticut (Pet. App. 41-42); respondents in *Underwood* were members of a nationwide class of tenants in such housing who were not members of classes in other pending litigation on this issue (*id.* at 200).

[2] Petitioners and counsel for the *Underwood* respondents participated in thesettlement agreement, and were represented on the COC. See *infra.*

certain specified expenses, but that "distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD." *Id.* at 140.

After EAJA became effective in October 1981, petitioners filed applications for attorneys' fees, seeking reimbursement for time spent both in the litigation and in the settlement administration process. The district court held that petitioners' application for fees for the litigation was not barred by the settlement agreement, that EAJA applied to this action, and that HUD's position was not "substantially justified". Pet. App. 49-58.[3] Accordingly, the court awarded petitioners fees under EAJA for time spent on the litigation of the case. But the court denied petitioners' claim for fees for settlement administration, holding that claim barred by Section 4(d) of the settlement agreement. *Id.* at 64.

Both parties appealed, and the Second Circuit reversed the award of attorneys' fees, holding that HUD was "substantially justified" in the instant case. Pet. App. 27-34. Petitioners filed a petition for certiorari, and after *Underwood* was decided the Court granted the petition, vacated the judgment of the court of appeals, and remanded this case for further consideration in light of *Underwood*. *Dubose* v. *Pierce*, No. 85-516, (June 30, 1988).

On remand, the court of appeals concluded, in light of *Underwood,* that the district court had not abused its discretion in holding that HUD was not "substantially justified" in this case; it also affirmed the district court's decision in all other respects. Pet. App. 1-17. Petitioners then sought rehearing on the question whether the settlement

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[3] Under EAJA, the court is to award a fee to a qualified party who prevails against the United States "unless the court finds that the position of the United States was substantially justified". 28 U.S.C. 2412(d)(1)(A).

agreement bars fees for settlement administration. The court of appeals denied the petition for rehearing (*id.* at 292). Petitioners now seek review of that question in this Court.

ARGUMENT

The decision of the court of appeals is correct, and this case presents no issue of sufficient importance to merit this Court's review.

1. Petitioners' primary contention is that the decision below conflicts with the decision of the Ninth Circuit in *Underwood* v. *Pierce*, 716 F.2d 1345 (1982), holding that the settlement agreement does not bar a claim for attorneys' fees for settlement administration. The lower courts in this case, however, correctly rejected that claim.

The district court in the instant case fully considered both the question whether the settlement agreement barred all fees for this litigation (Pet. App. 57-58) and the analytically distinct question whether the settlement agreement barred fees for settlement administration (*id.* at 64-65). It found that the plain meaning of the language of Section 4(d) of the settlement agreement—that "distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD"—barred imposition on the agency of the expense of fees for settlement administration. Since fees for settlement administration would unquestionably constitute "substantial costs and expenditures" which would be borne "by HUD," these fees plainly fall within the scope of the language and purpose of Section 4(d).

In contrast, the *Underwood* district court and the Ninth Circuit focused primarily on the question whether "in entering into the settlement agreement, Underwood

waived *all* claims for fees and is therefore barred from asserting a statutory claim" (*Underwood* v. *Pierce*, 761 F.2d at 1345 (Pet. App. 284; emphasis added), affirming in pertinent part 547 F. Supp. 256, 262-263 (C.D. Cal. 1982)); these courts gave only cursory consideration to the independent question—on which petitioners now seek certiorari—of whether the agreement itself barred fees for settlement administration. In particular, the Ninth Circuit refused to give effect to the plain language of Section 4(d) of the settlement agreement, instead stating conclusorily that "[r]eading the agreement as a whole, it is plain that Section 4(d) was not intended to address the question of the availability of attorneys' fees at all, but was rather concerned with miscellaneous 'housekeeping' expenses." 761 F.2d at 1345; Pet. App. 285. "Reading the agreement as a whole," however, in no way diminishes the force of Section 4(d)'s flat prohibition against imposing on HUD additional substantial expenses in connection with the distribution of the settlement fund. The plain language of Section 4(d) thus demonstrates that both courts below correctly interpreted the settlement agreement in this case.

In any event, the disagreement between the Second Circuit and the Ninth Circuit over whether the settlement agreement bars fees for settlement administration does not warrant resolution by this Court. Such a conflict—involving the interpretation of language in a particular settlement agreement—plainly is of no continuing significance and does not require the attention of this Court.

2. Petitioners also argue that "[i]t is appropriate to grant certiorari in this case to guide courts in the avoidance of such conflicts by giving appropriate preclusive effect to a final judgment interpreting a common settlement agreement in consolidated actions." Pet. 24. Petitioners, however, did not argue before the court of appeals that the

doctrine of collateral estoppel applies in this case.[4] It is well settled that absent extraordinary circumstances, this Court does not decide questions not raised in the court below. *E.g., Delta Airlines* v. *August,* 450 U.S. 346, 362 (1981); *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330 (1967). There are no extraordinary circumstances justifying a departure from the normal rule in the instant case.

In any event, petitioners' argument has no merit. In *United States* v. *Mendoza,* 464 U.S. 154 (1984), this Court refused to allow application of nonmutual offensive collateral estoppel against the United States. Petitioners concede that "the application sought here is arguably offensive, in that petitioners seek to prevent the Government from reasserting a defense that was unsuccessful in the previous action" (Pet. 25). Thus, unless the plaintiffs in *Underwood* and this case were in privity, there is no mutuality between the parties, and *Mendoza* controls.

Petitioners attempt to argue that privity exists in this case. However, the various actions settled with *Underwood* retained their individual character and were never consolidated, notwithstanding the fact that the *Underwood* court oversaw the settlement administration process. See, *e.g.,* Pet. App. 146 ("The District Courts having jurisdiction over the cases resolved by this settlement shall, if necessary, determine any issue or dispute relating to the settlement or to payment of claims."); *id.* at 150. Indeed,

[4] Although petitioners did argue in district court that HUD was collaterally estopped from opposing their EAJA claim for all services, both litigation and settlement administration, on the basis of the district court decision in *Underwood,* they did not renew this argument before the Second Circuit. Indeed, at no time in the court of appeals—even in their rehearing petition, filed in September 1988—did petitioners argue that HUD was collaterally estopped by virtue of *Underwood* from opposing their claim for fees for settlement administration.

the court responsible for the administration of the *Underwood* settlement itself dismissed petitioners' motions for settlement administration fees filed in *Underwood* on the ground that although petitioners' lead counsel, who was a COC member, had appeared before it, he "did so as counsel in *Dubose,* over which case th[e *Underwood* court] lacked jurisdiction." *Id.* at 47. Thus, contrary to petitioners' assumption, it is clear that the plaintiffs in the various operating subsidy cases were not in privity, and that therefore mutuality does not exist in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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